2014 IL App (1st) 131710-U
No. 1-13-1710
June 25, 2014

THIRD DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BOBBY BINION and CHIQUITA MAHON, Plaintiffs-Appellants, v. FLETCHER JONES OF CHICAGO, LTD., LLC, d/b/a MERCEDES BENZ OF CHICAGO, MERCEDES-BENZ FINANCIAL SERVICES USA, LLC f/k/a DCFS USA, LLC, CHICAGO AUTO RECOVERY OF ILLINOIS, INCORPORATED, JOSEPH GIBRICK and DAVID LENARD, Defendants-Appellees.	)	Appeal from the Circuit Court Of Cook County. No. 11 L 0997 The Honorable Raymond Mitchell, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Secured creditors have a non-delegable duty not to breach the peace when they repossess secured collateral. Evidence that the repossessor followed someone in a car and made a false report to police does not show that the repossessor caused a breach of the peace.

A principal bears no liability for defamatory statements made by an independent contractor unless the principal failed to use reasonable care in selecting the contractor, or the principal specifically directed the contractor to make the defamatory statements, or the defamatory statements breached the principal's non-delegable duty.

¶ 2 Bobby Binion and Chiquita Mahon, employees of Bobchiq Management Company, filed a complaint against Fletcher Jones of Chicago, Ltd., and Mercedes-Benz Financial Services (MBFS), alleging that when Fletcher and MBFS repossessed a car leased to Bobchiq, the service they used for the repossession breached the peace and defamed Binion and Mahon. The trial court granted Fletcher and MBFS's motion for summary judgment on the complaint. In this appeal, we agree with Binion and Mahon that MBFS and Fletcher have a non-delegable duty not to breach the peace when they repossess cars. However, we find that Binion and Mahon have not presented evidence which could support a finding that a breach of the peace occurred in the course of the repossession here. We also hold that Binion and Mahon have not presented evidence that Fletcher or MBFS or their agents defamed Binion or Mahon. Accordingly, we affirm the order granting Fletcher and MBFS summary judgment on the complaint.

¶ 3 BACKGROUND

¶ 4 In August 2005, Bobchiq leased a Mercedes-Benz from Fletcher. Binion, president of Bobchiq, guaranteed payment of amounts due under the lease. Bobchiq made some of the scheduled payments late, and by early 2007, it sought to negotiate a schedule for payment of late fees and other amounts due. Bobchiq last made a monthly car payment in March 2007, but it continued to try to negotiate a payment schedule with Fletcher and MBFS.

¶ 5 In July 2007, MBFS entered into a contract with Chicago Auto Recovery (CAR) for collection of debts and repossession of vehicles. On August 27, 2007, MBFS repossessed the car leased to Bobchiq.

¶ 6 Bobchiq, Binion, Mahon, and another employee of Bobchiq filed a complaint against Fletcher and MBFS in 2007. After a voluntary dismissal, the same plaintiffs filed a new complaint in January 2011, alleging that Fletcher and MBFS defamed the plaintiffs and breached the peace in the course of repossessing the car. MBFS responded with a counterclaim against Bobchiq and Binion for the amount remaining due on the lease after the resale of the car.

¶ 7 MBFS and Fletcher moved for summary judgment on both the complaint and the counterclaim. They presented an affidavit of an employee of MBFS who swore that CAR acted as an independent contractor when it repossessed the car for MBFS and Fletcher, and CAR's employees did not work for MBFS or Fletcher. The MBFS employee averred in the affidavit that MBFS sold the repossessed car in October 2007, and after the sale a specified deficiency remained owing on the lease contract.

¶ 8 MBFS also supported the motion for summary judgment with the depositions of three agents of Bobchiq. Detra Brame testified that once, in June or July 2007, when she went to the leased Mercedes parked by Bobchiq's office, a man walked up to her and shined a light at her. He then walked away. Some days later, she noticed the same man, with another man, following her as she drove a different car. The encounters scared her.

¶ 9 Binion testified that a friend of his told him that a man came to her home and told her that Binion led an international drug ring and an international auto theft ring. Binion also received a call from a man who said he worked as a police officer investigating criminal

activity. When the man did not respond to a request for his star number, Binion ended the call.

¶ 10 Mahon testified in her deposition that on August 27, 2007, she drove her son and her friend, Florenzia Clemens, a retiree, to Harper College in the leased Mercedes. Clemens stayed in the car while Mahon and her son went into an office at the college. Police came into the office and told everyone in the office that Mahon had a stolen car. Clemens told Mahon that as she waited in the parking lot, police pointed guns at her and told her to get out of the car with her hands up. Mahon showed the police documents proving that she had a right to possess the car. The officer told Mahon that he received a report that Mahon used drugs and stole the car.

¶ 11 Binion and Mahon presented no other depositions or other evidence in opposition to the motion for summary judgment. In particular, Binion and Mahon did not present any affidavit or deposition testimony from Clemens or the friend who told Binion someone had accused him of selling drugs and stealing cars.

¶ 12 For the defamation claim, the trial court found that the plaintiffs had not presented any evidence that Fletcher and MBFS employed the persons who made false reports to the police, and the plaintiffs had no evidence that the persons who accused Binion and Mahon of crimes acted as agents of Fletcher and MBFS.

¶ 13 The trial court also granted Fletcher and MBFS summary judgment on the claim for disturbing the peace, on grounds that the plaintiffs failed to present any evidence that the acts alleged – walking up to Brame, shining a light on her, following her, and falsely reporting a crime to police – disturbed the peace. The court also granted Fletcher and MBFS summary judgment on their counterclaim for deficient payment on the lease.

¶ 14 Binion and Mahon, pro se, now appeal from the judgment entered in favor of Fletcher and MBFS on the complaint. They do not challenge the ruling on the counterclaim.

¶ 15 ANALYSIS

¶ 16 Breach of the Peace

¶ 17 Binion and Mahon first argue that Fletcher and MBFS bear responsibility for the actions of their independent contractor, CAR. Illinois has adopted the Uniform Commercial Code (UCC), specifically to "make uniform the law among the various jurisdictions" using the UCC. 810 ILCS 5/1-102 (West 2006); see 810 ILCS 5/1-103 (West 2010). The UCC imposes on secured creditors a duty not to breach the peace when repossessing secured collateral. 810 ILCS 5/9-609 (West 2006). Illinois courts may look to cases from other jurisdictions for aid in interpreting the UCC. See *Garver v. Ferguson*, 76 Ill. 2d 1, 8 (1979).

¶ 18 When looking at cases from other jurisdictions, we found:

> "Other jurisdictions agree that a creditor cannot escape the duty of peaceable repossession by delegating it to an independent contractor. See *General Fin. Corp. v. Smith*, 505 So. 2d [1045,] 1048 [(Ala. 1987)]; *Sammons v. Broward Bank*, 599 So. 2d 1018, 1021 (Fla. Dist.Ct.App.1992); *Massengill v. Indiana Nat'l Bank*, 550 N.E.2d 97, 99 (Ind. Ct. App. 1990); *Nichols v. Metropolitan Bank*, 435 N.W.2d [637,] 640 [(Minn. Ct. App. 1989)]; *McCall v. Owens*, 820 S.W.2d 748, 751-52 (Tenn. Ct. App.), appeal denied (Tenn.1991); *Ragde v. Peoples Bank*, 53 Wash. App. 173, 767 P.2d 949, 950 (1989); see also *Henderson v. Security Nat'l Bank*, 72 Cal. App. 3d 764, 140 Cal. Rptr. 388, 390-91 (197[7]) (bank held liable for torts committed by its independent contractor in the course of repossession);

> *Southern Indus. Sav. Bank v. Greene*, 224 So. 2d 416, 418 (Fla.Dist.Ct.App.1969) ('Once having chosen this remedy [of repossession under section 9-609], the instituting party subjects itself to any liability due to negligence [arising] in the course of enforcement.'); *Cottam v. Heppner*, 777 P.2d 468, 472 (Utah 1989) ('By negative implication, [section 9-503] prohibits repossessions that involve a breach of the peace.')" *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 153-54 (Tex. 1992).

As the court said in *Rand v. Porsche Financial Services*, 167 P.3d 111, 120 (Az. App. 2007), "our review of the relevant decisions indicates that most jurisdictions that have considered this issue have concluded that the U.C.C. statute authorizing self-help repossession imposes a nondelegable duty to avoid breaching the peace." See also *Clark v. Associates Commercial Corp.*, 877 F. Supp. 1439, 1447 (D. Kan. 1994); *Hester v. Bandy*, 627 So. 2d 833, 842-43 (Miss. 1993); *Robinson v. Citicorp National Services, Inc.*, 921 S.W.2d 52, 54-55 (Mo. Ct. App. 1996); *DeMary v. Rieker*, 695 A.2d 294, 301 (N.J. Super. 1997); *Mauro v. General Motors Acceptance Corp.*, 626 N.Y.S.2d 374, 376-77 (N.Y. Sup. Ct. 1995); *Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 862 (Okla. 1998).

¶ 19 Fletcher and MBFS cite *Lang v. Silva*, 306 Ill. App. 3d 960, 972 (1999), as authority establishing that the court cannot hold them liable for the acts of their independent contractor, CAR. However, *Lang* did not involve auto repossession or the UCC. *Jones v. Beker*, 260 Ill. App. 3d 481 (1994), which Fletcher and MBFS did not cite, concerns auto repossession and invokes the general principle that principals usually do not bear liability for the acts of independent contractors, but the *Jones* court did not mention the UCC or precedent from other jurisdictions. We decide not to follow *Jones* here. Using the

interpretive principles established in section 1-102 of the UCC, and following the weight of authority from other jurisdictions, we find that secured creditors, like MBFS, have a non-delegable duty not to breach the peace when they repossess secured collateral. The courts may find them liable for the acts of independent contractors who breach the peace in the course of repossessing secured collateral.

¶ 20 Binion and Mahon presented evidence that someone followed Brame, shined a light on her, and frightened her, and police officers accused Mahon of driving a stolen vehicle. Binion and Mahon, in their depositions, added some inadmissible hearsay, as they testified about what friends had said to them. See *Murphy v. Urso*, 88 Ill. 2d 444, 463 (1981). We must decide whether the evidence creates a genuine issue of fact on the issue of whether Fletcher and MBFS caused a breach of the peace. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517 (1993).

¶ 21 In *People v. Allen*, 288 Ill. App. 3d 502 (1997), the court adopted the following definition of "breach of the peace:"

> "The term 'breach of the peace' has never had a precise meaning in relation to specific conduct. Yet from its early common law origin to the present it has received a fairly well defined gloss. 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others.' *Cantwell v. State of Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 905, 84 L. Ed. 1213, 1220 (1940). The term connotes conduct that creates consternation and alarm. It is an indecorum that incites public turbulence; yet violent conduct is not a

> necessary element. The proscribed conduct must be voluntary, unnecessary, and contrary to ordinary human conduct. On the other hand, the commonly held understanding of a breach of the peace has always exempted eccentric or unconventional conduct, no matter how irritable to others. It seems unnecessary to add that whether a given act provokes a breach of the peace depends upon the accompanying circumstances, that is, it is essential that the setting be considered in deciding whether the act offends the mores of the community." *United States v. Woodard*, 376 F.2d 136, 141 (7th Cir.1967), quoted in *Allen*, 288 Ill. App. 3d at 506.

¶ 22 Assuming that a CAR employee followed Brame, once, in a car, and once shined a light on her, we cannot say that the conduct caused a breach of the peace. While the circumstantial evidence might support an inference that CAR or MBFS made a false police report, the report apparently led to only an embarrassing situation at Harper College, and not to a breach of the peace. We affirm the decision to grant summary judgment in favor of Fletcher and MBFS on the count for breach of the peace, because Binion and Mahon failed to present sufficient evidence to create a genuine issue of material fact on the issue of whether a breach of the peace occurred. See *Johnson v. Grossinger Motorcorp, Inc.*, 324 Ill. App. 3d 354**,** 364-65 (2001); *Chrysler Credit Corp. v. Koontz*, 277 Ill. App. 3d 1078, 1083-84 (1996).

¶ 23 Defamation

¶ 24 Although the UCC imposes on secured creditors a non-delegable duty not to cause a breach of the peace when they repossess secured collateral, the UCC does not make secured creditors generally liable for torts committed by independent contractors working on repossession of collateral for the secured creditors, if the torts do not breach the peace. See

810 ILCS 5/9-609 (West 2006). For the defamation count, the general rule restated in *Lang* applies: "One who hires an independent contractor *** is generally not liable for the negligent or intentional acts or omissions of the contractor." *Lang*, 306 Ill. App. 3d at 972. Courts will hold the principal liable for breaches of delegable duties by an independent contractor only when the principal directed the contractor to commit the injurious acts, or the principal failed to use reasonable care in the selection of the independent contractor. *Kouba v. East Joliet Bank*, 135 Ill. App. 3d 264, 267 (1985); *Lewis v. Mount Greenwood Bank*, 91 Ill. App. 3d 481, 487 (1980).

¶ 25 Binion and Mahon have presented no evidence about what Fletcher and MBFS knew or should have known about CAR before they hired CAR to repossess cars. The evidence presented on the motion for summary judgment does not create a genuine issue of fact on the issue of whether Fletcher and MBFS used reasonable care when they selected CAR as their independent contractor. Also, Binion and Mahon presented no evidence to support an inference that Fletcher and Mahon directed CAR to falsely report to police that Mahon had stolen the car, or to make any other defamatory statements. Therefore, we affirm the order granting Fletcher and MBFS summary judgment on the defamation count.

¶ 26 CONCLUSION

¶ 27 Under the UCC, secured creditors have a non-delegable duty not to disturb the peace when they repossess secured collateral. However, Binion and Mahon have presented no evidence to create a genuine issue of fact that a breach of the peace occurred in the course of the repossession of Bobchiq's car. They also presented no evidence to create a genuine issue of fact as to whether agents of Fletcher and MBFS, rather than their independent contractor, made defamatory statements about Binion and Mahon to police or to Binion's friend.

Accordingly, we affirm the order granting Fletcher and MBFS summary judgment on the complaint.

¶ 28 Affirmed.